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IN THE

Supreme Court of the United States

October Term, 1954

No. 365

T. A. LOVING & COMPANY, a corporation organized and existing under the laws of the State of North Carolina, Bank of Wayne Building, Goldsboro, North Carolina,

and

SOUTHEASTERN CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of North Carolina, 301 Second Street, Charlotte, North Carolina,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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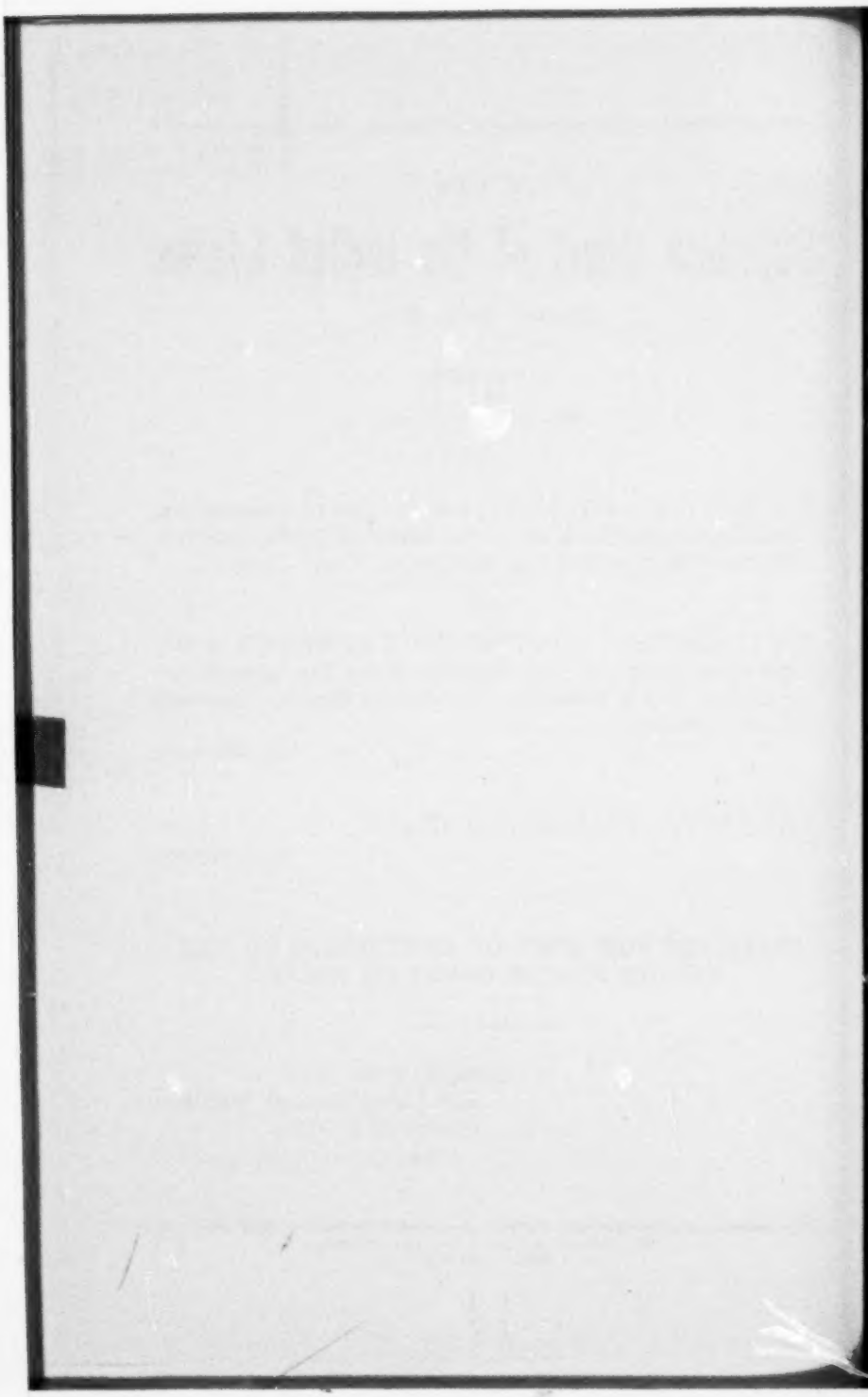

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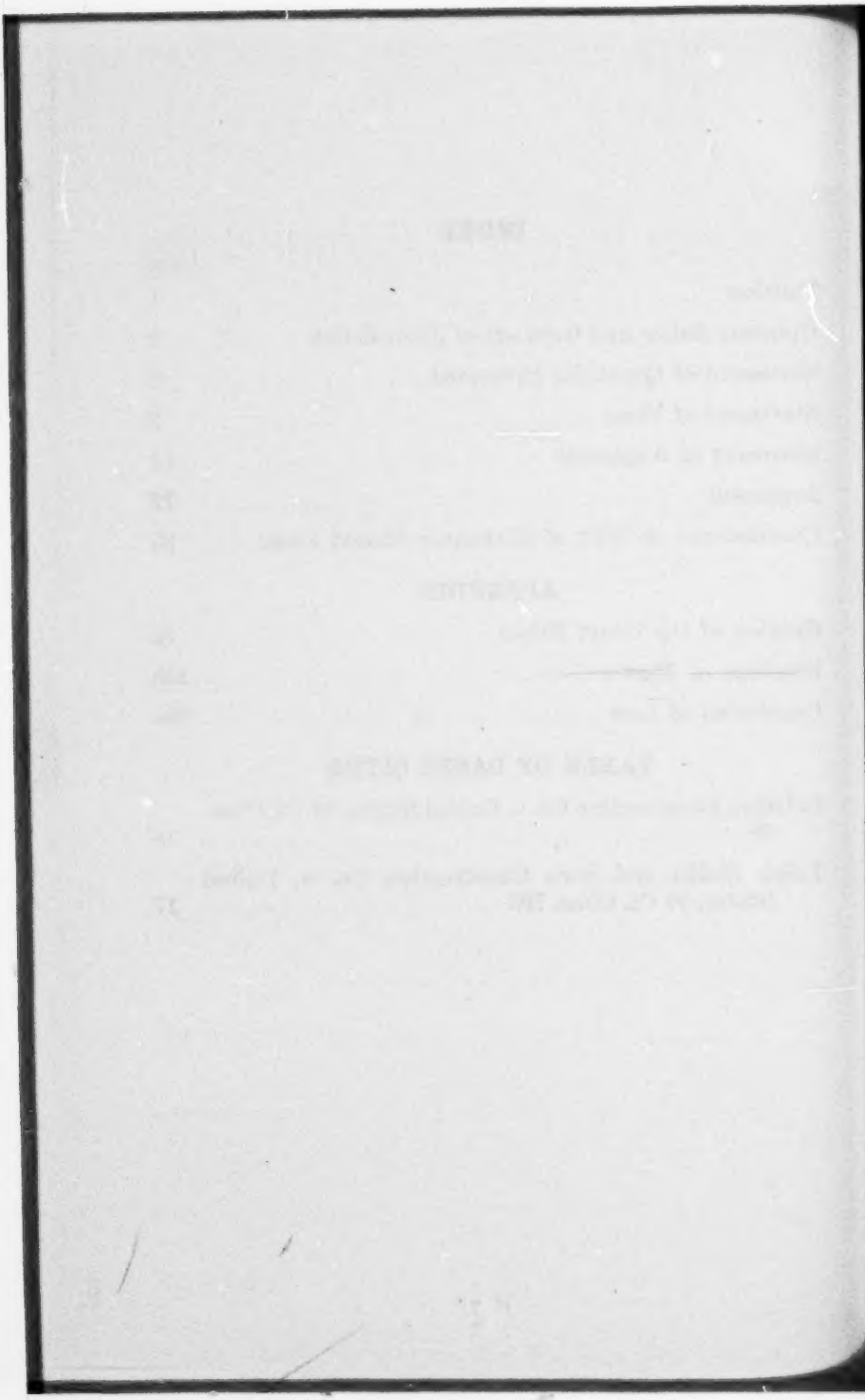

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners T. A. Loving & Company and Southeastern Construction Company, respectfully pray, for reasons good and sufficient as hereinafter stated, that a Writ of Certiorari issue to review an order entered June 7, 1955, by the

United States Court of Claims in cause No. 6-53 on its records.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The opinion of the United States Court of Claims in the within matter was promulgated on June 7, 1955, and is reported in ——— Court of Claims ———. A copy of said opinion is appended hereto.

Jurisdiction is conferred on this court by virtue of 62 Stat. 961, amended May 24, 1949, c. 139, Para. 106, 63 Stat. 104, 28 U. S. C. A., Section 2101; 62 Stat. 928, c. 646, June 25, 1948, 28 U. S. C. A., Section 1255.

STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

Whether the Court below, as a matter of law, erred in the construction and interpretation of the contract between the parties in holding that Petitioners were required to furnish "structural unglazed facing units" instead of structural unglazed units;

Whether, as a matter of law, in the construction and interpretation of a contract a court may properly look beyond the words "structural unglazed units" as they were used in the Finish Schedule and where they have a plain and definitive meaning which is clear in the context where used, to find that the words were intended to mean something other than their plain meaning in the instant use.

STATEMENT OF FACTS

1. Plaintiff T. A. Loving & Company is a corporation organized and existing by virtue of the laws of the State of North Carolina with its principal office at Goldsboro, North Carolina.

2. Plaintiff Southeastern Construction Company is a corporation organized and existing by virtue of the laws of the State of North Carolina with its principal offices at Charlotte, North Carolina.

3. The plaintiffs are engaged in business as general contractors for the construction of buildings and other works, and insofar as this petition is concerned, were and are acting as joint contractors and coadventurers.

4. On November 24, 1947, the office of the District Engineer, Huntington District, Corps of Engineers, U. S. Army, issued an invitation for bids for the construction of a Veterans' Administration Hospital at Beckley, West Virginia. The invitation was designated Serial No. W-46-022-eng 48-78 and was accompanied by specifications and drawings.

5. Plaintiffs formed a joint venture to undertake the performance of the general contract for the construction of the hospital at Beckley, entered their bid and the same was accepted. On February 19, 1948, Contract No. W-46-022-eng-1476 was executed between the plaintiffs and the United States for the construction of the Veterans' Administration Hospital and appurtenances, Beckley, West Virginia (except elevators, dumbwaiters and quarters). The contract price was $4,975,123.

The specifications referred Petitioners to the Finish Schedule for a determination of what materials should be used in any given area. The controversy herein involves the requirement of the Government that Plaintiffs install structural unglazed *facing* tile (or units) in the Boiler House or Garage of the hospital where Finish 51 is called for in the Finish Schedule.

The description of Finish 51 is contained in key sheet 40-04-ASHPE-1 (Pltffs' Ex. 8). In the vertical column marked "walls" opposite Finish 51, the letters "DO" appear, meaning "Ditto," and referring to the words

"structural unglazed units" appearing above. It is most important to note that the word "*facing*" is absent from this description, viz., the finish required is not "structural unglazed *facing* units." The Government required plaintiffs to install "structural unglazed *facing* units" in these areas, and plaintiffs contend that they could not properly be required to do so under the requirement of the Finish Schedule and of the Specifications, which, is above noted, called for "structural unglazed units."

In summing up the facts and issues in the case, the court below said (Opinion, p. 9):

> "This case turns upon the meaning of the phrase 'structural unglazed units.' Plaintiffs [Petitioners] assert that the term excludes facing tile and insist that the defendant's requirement that facing tile be used where the plans and specifications called for 'structural unglazed units' imposed an unauthorized additional expense upon the contractors for which defendant is liable. It is defendant's position that the phrase 'structural unglazed unit' means facing tile."

Again the court below said (Opinion, p. 3):

> "The question presented is whether the Specifications here involved required the use of facing tile when 'structural unglazed units' were called for on the Finish Schedule."

The pertinent sections of the contract specifications are as follows, and it should be kept in mind that on the Finish Schedule where Finish 51 is called for, the words "structural unglazed units" appear, and not the words "structural unglazed *facing* units."

> SC-2 *Drawings—contract drawings, maps and specifications.*—Ten sets of contract drawings, maps and specifications will be furnished the contractor without

charge. Additional sets will be furnished on request at the cost of reproduction. The work shall conform to the following drawings, all of which form a part of these specifications and are available in the Office of the Corps of Engineers, Department of the Army, at Huntington, West Virginia.

Drawing No.:	*Title*
40-04-ASHPE-1	Key Sheet
32-01-A-2	Basement Floor Plan
36-13-A-2	Plans

SECTION 4

MASONRY: BRICK AND STRUCTURAL TILE

4-01. SCOPE: The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of brick and structural tile masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

402. APPLICABLE SPECIFICATIONS: The following Federal Specifications form a part of this specification:

HH-B-671c	Brick; Fire Clay.
QQ-B-71a	Bars; Reinforcement, (For) Concrete.
SS-B-656	Brick; Building (Common), Clay.
SS-B-681	Brick; Sand-Lime.
SS-T-316	Tile; Partition, Gypsum.
SS-T-341a	Tile; Structural, Clay, Load-Bearing, Wall.
SS-T-351a	Tile; Structural, Clay, Non-Load-Bearing.

4-03. MATERIALS: • • •

(g) *Structural Clay Tile:* Structural clay tile shall include all the standard shapes required to complete the construction, and shall conform to the following:

(1) *Load-Bearing Clay Tile:* Load-bearing clay tile shall conform to the requirements of Federal Specification SS-T-341a, grade LB, and shall be of design shown on drawings. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall have a plaster base finish.

(2) *Non-Load-Bearing Clay Tile:* Non-load-bearing clay tile shall conform to the requirements of Federal Specification SS-T-351a. The exposed faces of the tile shall be smooth except where the tile serves as a base for plaster in which case the tile shall be scored to receive the plaster. The tile shall have a clear ring when struck.

SECTION 5

MASONRY: STRUCTURAL FACING UNITS

5-01. SCOPE: The work covered by this section of the specifications consists in furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with the furnishing and installation of the structural-facing-unit masonry, complete, in strict accordance with this section of the specifications and the applicable drawings, and subject to the terms and conditions of the contract.

5-02. ALTERNATE C: Attention is invited to the fact that Alternate C provides for the elimination of painted walls above the structural glazed tile wainscot for Room Finishes Nos. 5, 14, 17, 18, 19, 21, 31 and 32 and in lieu thereof provides for the construction of the entire wall from floor to ceiling of structural glazed tile for such room finishes. The contractor will be required to perform such work in accordance with the contract which will indicate whether the construction contemplated shall be in accordance with the basic specification or Alternate C.

5-03. APPLICABLE SPECIFICATION: The following Federal Specification forms a part of this specification:

SS-T-341a Tile; Structural, Clay, Load-Bearing, Wall.

5-04. GENERAL: Structural facing tile shall be installed in the spaces shown on the drawings and shall be glazed and unglazed units as hereinafter specified. Units shall be of the sizes indicated on the drawings, and all shapes and sizes shown or required for a complete and proper installation shall be furnished or cut on the job. Job cutting shall be by a motordriven saw

designed for the purpose. Cut edges shall be clean and sharp. Backs of units upon which plaster is to be applied shall be scored, combed, or roughened. Beds, ends, and backs upon which mortar or plaster is to be applied shall be reasonably free from glaze. Units shall be delivered, stored, and handled in a manner that will protect them from stain and damage. Structural glazed units marked in Finish Schedule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units.

(a) *Special Shapes:* Bullnose corners, bullnose caps, flush coved base and round top coved base, slope sills, standard radials (radius 4-foot), and coved interior corners shall be furnished where shown or specified. Unless otherwise specified, all external vertical corners, and external corners of sills, and caps shall be bullnose, base shall be flush on top and coved to meet floor finish, and internal corners shall be square.

5-05. STRUCTURAL FACING UNITS:

(a) *General Requirements:* Except as otherwise specified herein, structural facing units shall conform to the requirements of Federal Specification SS-T-341a. Structural facing units shall be made of selected fusible materials of the types hereinafter specified, carefully proportioned, thoroughly mixed, and burned as straight and true as careful manufacture can achieve to produce a strong homogeneous body that will give a sharp metallic-bell-like ring when struck. The minimum thickness of the outside shell at any point shall be not less than $\frac{5}{8}$ inch except that with side construction units with scored beds the minimum thickness of the top and bottom shells from the inner surface to the bottom of the grooves shall be $\frac{1}{2}$ inch, and with multicored units designed to be split for fractional lengths the minimum thickness from face to kerfing cores shall be $\frac{1}{2}$ inch. Where a structural facing unit wainscot is required to be finished flush with plaster above, such units shall have all corners sharp and square.

(b) *Types and Qualities:*

(1) *Ceramic-Opaque-Glazed Fire-Clay Units:* The body of all ceramic-glazed fire-clay units shall be of clear-burning, plastic, fire clay. The face or faces that will be exposed when units are in place shall be free from cracks and shall be covered with an opaque ceramic glaze. The glaze shall be compounded of metallic oxides, chemicals and clays, thoroughly ground together and sprayed upon the previously formed body and then fused to the body by burning the units at high temperatures to give a matte finish. The texture of the finish shall be smooth and the color shall be the manufacturers standard shade of green or cream tan, and shall conform to the approved samples. The glaze of select quality, ceramic-glazed fire-clay units shall be free from chips, crazes, blisters, crawling, or other imperfections detracting from the appearance of the finished wall when viewed from a distance of 5 feet. The faces of the units shall pass the tests hereinafter specified for imperviousness, opacity, fading, and resistance to crazing. Over-all dimensions of the face of units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the face of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 10 percent and for an average of 5 units shall be 8 percent. Requirements for minimum absorption will be waived. The minimum compressive strength of any one end-construction unit shall be 2500 psi and of any one side-construction unit shall be 1500 psi. The average compressive strength of 5 end-construction units shall be not less than 3000 psi and of 5 side-construction units shall be not less than 2000 psi.

(2) *Smooth Unglazed Units:* All smooth unglazed units shall be type FTX, heavy-duty, select quality. The body of all smooth unglazed units shall be manufactured of fire clay. The face or faces that will be ex-

posed when units are in place shall be free from cracks and shall have a smooth, unbroken, natural-die finish. The color of the faces shall be BUFF and shall conform to the approved samples. The finished face or faces of the smooth unglazed units shall be free from chips and other imperfections detracting from the appearance of the finished wall when viewed from a distance of 10 feet. Units having surface chips not in excess of ⅛ inch in from edges and ¼ inch in from corners will not be rejected. The faces of the units shall be highly resistant to staining and easily cleaned. Over-all dimensions of the face of the units shall not differ by more than 1.5 percent over or under the intended dimensions, and for any one structure the difference in the over-all dimensions of the faces of the individual units shall not exceed 1.5 percent of the intended dimensions. The maximum permissible distortion of the faces from a plane and of the edges from a straight line shall be those shown in column one of table I below. The maximum absorption of any one unit shall be 9 percent and for an average of 5 units shall be 7 percent. Requirements for minimum absorption will be waived. The minimum compressive strength of any one end-construction unit shall be 2000 psi and of any one side-construction unit shall be 1000 psi. The average compressive strength of any 5 end-construction units shall be not less than 2500 psi and of 5 side-construction units shall be not less than 1000 psi.

5-05. (b) (3) *Permissible Distortion of Face or Edges:* Distortions of the face from a plane, or the edges of the face from a straight line when measured as the maximum ordinate from the plane or line to the face or edge shall not exceed the amount given below.

TABLE I

Standard face dimensions (height and length) in inches	Maximum permissible distortion in inches 1
2⅝ x 7⅝	3/64
5 1/16 x 7⅝	1/16
5 1/16 x 11¾	3/32
3⅝ x 11¾	3/32
7⅝ x 11¾	3/32
7⅝ x 15¾	3/16

(4) *Compressive Strength:* Test for compressive strength shall be made in accordance with the methods described in Federal Specifications SS-T-341a.

On December 19, 1947, Addendum No. 1 was issued by the Huntington District Engineer which amended the Specifications accompanying the invitation for bids. The material amendments contained in Addendum No. 1 are as follows:

SPECIFICATION

* * * * *

(11) *Par. 4-01, Page 4-1.* In the fourth line of this paragraph, delete "installation of brick and structural tile masonry" and substitute the following therefor: "installation of brick, structural tile and concrete block masonry."

(12) *Par. 4-02, Page 4-1.* Add the following at the end of this paragraph: "SS-C-621. Concrete Units; Masonry, Hollow."

(13) *Par. 4-03 (g) (2), Page 4-3.* After this subparagraph, add the following subparagraphs:

(h) *Concrete Masonry Units:* Concrete masonry units may be used, at the contractor's option, instead of the corresponding type of structural clay tile and shall conform to the following:

(1) *Load-Bearing Units:* Load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type I, with weight of concrete 100 pounds or less per cubic foot. Units shall be of standard sizes and shapes including closers and shapes required by the construction, shall be free of any deleterious matter that will stain plaster or corrode metal, and shall be adequately cured before shipment.

(2) *Non-Load-Bearing Units:* Non-load-bearing concrete masonry units shall conform to the requirements of Federal Specification SS-C-621, Type II, with weight of concrete 100 pounds or less per cubic foot.

(14) *Par. 4-04, Page 4-3.* Add the following at the end of this paragraph:

"Concrete masonry units—2 of each type."

(15) *Par. 4-06 (c), Page 4-5.* Insert in the title of this subparagraph and in the first line after "structural clay tile" the following: "or concrete masonry units."

(16) *Par. 5-02, Page 5-1.* Delete the word "tile" appearing in the third and fifth lines of this paragraph and substitute the words "facing unit" therefor.

• • • • •

Petitioners believe that the foregoing are all of the specifications which are pertinent here; and it is upon these parts of the specifications, and upon the Key Sheet 40-04-ASHPE-1 where the Finish Schedule is contained and where, under Finish 51, the words "structural unglazed units" appear, that the controversy revolves.

SUMMARY OF ARGUMENT

Petitioners contend that the Court of Claims erred in construing the contract so as to require Petitioners to furnish facing tile instead of structural unglazed units; that the court, in so holding, looked beyond the words "structural unglazed units," which it had no right to do because the words "structural unglazed units" have a plain and definitive meaning themselves and are clear in the context of the Finish Schedule where they were used.

Petitioners arrive at their conclusions by the following: (I) That there is a marked and unquestioned difference, which is well known in the trade, between "structural unglazed *facing* units" on the one hand, and "structural unglazed units" on the other hand; (II) that "structural unglazed *facing* units" must conform to more rigid requirements as to appearance (uniformity of color, finish, limitations as to variation in size, etc.) than "structural unglazed units" and hence are more expensive; (III) that the specifications and the Finish Schedule call for "structural unglazed units" only; (IV) that the Finish 51 in the Finish Schedule is clear in itself and therefore the Court

below had no right to go elsewhere in the contract documents to find that the term "structural unglazed units" meant other than its plain and accepted meaning in the trade; and (V) that having been required to install a *facing* tile where it was not required by contract documents, Petitioners are entitled to reimbursement for the additional costs and expenses incurred. Petitioners further urge that even had the court had such license to look beyond the plain and customary meaning of the term "structural unglazed units" (which we deny that it did), it nevertheless misconstrued the contract because the Specifications referred to by the court as requiring Petitioners to furnish facing tile do not make such a requirement when properly read.

ARGUMENT

(I) There Is a Marked and Unquestionable Difference, Which Is Well Known in the Trade, Between Structural Unglazed Facing Units and Structural Unglazed Units (omitting the term "facing")

and

(II) "Structural Unglazed Facing Units" Must Conform to More Rigid Requirements and That Is the Distinction Between the Two Types of Units.

Testimony was introduced to show the significance of the term "facing" in the trade. This testimony is cited only to show the significance of the term in the trade. It is *not* cited because there is a dispute as to a question of fact involved; there is no disagreement here. In other words, the dispute is not the significance of the term "facing" but whether the contract documents require facing tile in the disputed areas. Petitioners claim that the Court below, in so finding, distorted the plain meaning of the contract and gave it a bent and unwarranted meaning.

Jacob Lichter, who has been in the masonry contracting business since 1924, and his qualifications and experience show that his knowledge of the customs and usage in the trade are the very highest, stated upon being questioned by his counsel as follows:

"Q. Mr. Lichter, I will ask you whether in the building trade there is a definable difference between the words 'structural units' and 'structural facing units.'

A. There is.

Q. Would you state that difference, please?

A. Structural units are units of building material for which the essential properties—I will restate that —in which specifications for properties are without any regard to appearance. Structural facing units are building units for which the specifications relate to properties, not only for strength and durability, but also for matters of appearance.

Q. Will you state whether, when the term structural unit is used as contradistinguished from the words 'structural facing units,' it means a different type of unit to the trade?

A. It does.

Q. Now, what is a structural facing unit? You have defined structural unit. What is a structural facing unit?

A. Well, I think I have defined a structural facing unit also. I said a structural facing unit is a building unit for which specifications relate to properties, not only for strength and durability, but also for matters of appearance.

Q. Is there any other way that structural units and structural facing units are distinguished, except by the use of the term 'facing'?

A. No, sir."

The foregoing shows that the term "facing" is the significant term used in detail to distinguish structural tile from structural facing tile.

Reference is made also to the book of Harry C. Plummer. Section 106 of his book, headed "Types of Structural Wall Tile," which reads as follows:

> "Structural wall tile may be divided into two groups, based upon the requirements for surface finish: (1) structural loadbearing and nonloadbearing tile for which factors governing appearance are not controlled by specifications;
>
> (2) Structural facing tile suitable for use where one or more faces will be exposed in the finished wall and for which specifications include requirements on color and finish."

What the foregoing mean is that when the term "facing" is interposed into the phrase structural unglazed tile, the meaning is changed and the tile required is a different and more expensive type of tile. Mr. Lichter's testimony is likewise clear in this respect when he testified as follows:

> "Q. Is there any other way that structural units and structural facing units are distinguished, except by the use of the term 'facing'?
>
> A. No, sir."

Finally, Mr. Malcolm H. Allen, the Government's witness (and the only one qualified to testify concerning masonry materials), testified as follows:

> "Q. What is the difference between a structural unit and a structural facing unit?
>
> A. A structural unit may be any building unit used in building construction where its function is to carry either its own weight or superimposed loads, and where there is no concern for appearance or surface coloration defects, etc. A structural facing unit is likewise a structural unit which must be loadbearing or be able to carry its own weight which also makes it suitable for exposed use.
>
> Q. So the difference between a structural unit and a structural facing unit is the propery of appearance?

A. That is correct.

Q. Then do I conclude from what you said—do I conclude properly, Mr. Allen—that the difference between *structural* units and *facing* units is the use of the term *facing*?

A. Considering those two terms side by side, yes, the difference would be in the word facing.

Q. Well, if you used 'facing,' you get a facing unit; and if you don't use 'facing unit,' you don't get a facing unit when it is specified, isn't that true? . . .

A. Well, that would be correct if that's all that was specified, yes, sir.

Q. What is the term used in the trade to describe a structural unglazed facing unit?

A. The complete and correct term would be the phrase you just used, 'structural unglazed facing unit.' "

It is indisputable, therefore, that when a structural facing unit is desired, the term "facing" must be used. This is and always has been Petitioners' contention, and it is confirmed by Mr. Allen, the Government's own witness. And, the Court below apparently agrees because it said (p. 20 of the Opinion):

> "It is conceded that the full self-contained description of the finish which plaintiffs were required to install in the disputed areas is 'structural unglazed facing units.' . . ."

(III) The Specifications Call for "Structural Unglazed Units" Only

and

(IV) The Finish Schedule and Finish 51 Is Clear in Itself and Therefore the Court Below Had No License to Go Elsewhere and to Read "Facing" Into the Words "Structural Unglazed Units."

Petitioners again point out that the term "facing" does not appear in Finish 51; in other words, that Finish 51 calls

for "structural unglazed units" and not "structural unglazed facing units." There being, as indicated above, the unquestioned difference in the terms, upon what reasoning could the Government require (and the Court below approve) "facing units" to be furnished by Petitioners?

The error of the court was committed at the outset. By looking at the specifications (Sections 4 and 5) to determine what kind of units were required in Finish 51 where "structural unglazed units" were called for, the court showed that it did not, in fact, go along with what there was no dispute about, viz., that the term "facing" distinguished the two types of structural units. The court thereby showed that it did not wish to follow what Mr. Allen, the Government's chief witness, said was the correct description of a "structural unglazed facing unit" (see page 15 hereof), or what the court called a "full self-contained description" of facing tile. What we mean to say is that if Mr. Allen is correct (as well as Mr. Lichter and the court) that "structural unglazed unit" means one thing and "structural unglazed facing unit" means something else, what right has the court to go to Sections 4 and 5 of the specifications to read "facing" into the words "structural unglazed units" in the Finish 51 of the Finish Schedule? True, the court (and the Contracting Officer) would have the right to look at the specifications to see what kind of "structural unglazed units" were required, but *not* to find out whether "structural unglazed units" meant that or meant practically its opposite, "structural unglazed *facing* units."

Stated in another way—and perhaps more legalistically—the plain and ordinary meaning of "structural unglazed units" is clear in itself and is not ambiguous; not being ambiguous, there is no license to look for implications or to look elsewhere for its meaning. This is the nub of the court's error. What the court did, to be blunt about it,

was to assume that appearance was a factor and then set out to prove that "facing" units were called for. We will show under (V) below that even were the court permitted to adopt this approach it is wrong, but suffice it to say here that the court is not warranted in refusing to analyze the words "structural unglazed units" as they appear in the Finish Schedule. There is no reason to look for a strained construction when the plain meaning of the words is fitting and the context plain. In *Ralph Sollitt and Sons Construction Co.* v. *United States*, 80 Ct. Clms. 798, this same court said:

> "The evidence shows that in the building trade there is a well-defined difference between 'vitrified fire clay tile.' The distinction is not only in the cost of the tile, but also in the handling. There is no mention in Alternative A of glazed tiles. The defendant contends that the provision in this Alternative—'vitrified clay tiles and the method for erecting them, shall conform to the applicable requirements of Section 6'—referred to the class of tile, and, as glazed tiles are named in section 6 for the wainscots, when the two sections are read together the contract could mean glazed tiles were called for under the Alternative. We can see no reason for such a strained construction of the plain words of the contract. The reference to Section 6 was applicable to the method of erection of the tiles, and cannot possibly be construed to mean the class of tiles to be used. . . ."

What Petitioners are suggesting is that the Court of Claims should have followed its own pronouncements and not strain to uphold the Government.

On page 10, the Court said that "it is clear that appearance was a primary consideration in Section 5 . . ." and goes on to argue that, hence, consideration of appearance must be used in determining the meaning of the term "structural unglazed units" in the Finish Schedule (page

10). Section 5, other than Paragraphs 5-02 and 5-04, is purely descriptive of structural facing units; other than in these two paragraphs, it contains no instructions for the use of any material in any specific location. The Court has read into this purely descriptive section a requirement that such facing tile be used in the Boiler House and Garage because of alleged consideration of appearance. Apparently, too, the Court has assumed that "structural unglazed units," unless they are "facing" units, would not be proper for use where exposed to view because of such consideration. We submit that this is untrue, and there is nothing in the record to support such a deduction. We further submit it is not the function of this Court to attempt to say which is the proper material to be used in any specific location. Most assuredly, it is not the function of the Court, contrary to the plain meaning of the term "structural unglazed units," to say that such units are not proper for use where exposed in a Boiler House and Garage, and hence, that the more expensive structural unglazed facing units must be used.

On page 10, the Court further says that structural facing tile is the subject of Section 5-04, and goes on to argue that everything in that section has to do with such structural facing tile. This is untrue on its face; the subject of this section is "General," and the references to materials and work in this section are clearly and distinctly separate, and interpretable only from the language of each sentence.

Finally, it should be observed that if it becomes necessary, as the Court has found, to imply a meaning into the term "structural unglazed units" (which we deny), an ambiguity is pointed to, and any implication of any ambiguity, or of its result, must be resolved against the writer of the specifications, i.e., the Government. *Callahan Construction Co.* v. *United States*, 91 Ct. Clms. 38.

This, of course, the Court did not do; this is clear if anything is clear. No ambiguity was resolved against the Goernment. What the Court here did was to avoid the rules of interpretation of contracts where an ambiguity is found to exist (which it did when it went beyond the words "structural unglazed units" of Finish 51) by stating that the interpretation was "relatively simple" and thus sidestepped the whole question of ambiguities.

The Court was insistent upon following the interpretation of its Commissioner and the contracting officer. As illustrative of this insistence we point to that section of the Court's opinion (p. 10; second full paragraph) concerning the testimony of the liaison engineer, Mr. Brown. His testimony sounds good in support of the Court's conclusion, especially where the Court says that Petitioners abided by Mr. Brown's interpretation without protest. The fact is, though, that what the Court says is untrue. The true picture of this situation is as follows:

Mr. Brown testified that he was the liaison officer who made frequent inspection visits to the job, but in the long ensuing period after construction, whether from August, 1948 to March, 1950, or whether from July, 1949 to March, 1950, he had failed to raise the question.

The dispute on the type of tile to be used in the Boiler House and Garage came up in *the fall of 1949*. Mr. Brown raised the question about the type of tile to be used in the basement rooms in *March, 1950* (Pltffs.' Ex. 9). It follows then that the question with reference to the basement rooms came up several months *after* the controversy arose in connection with the Boiler House and Garage, and obviously was merely a face-saving action to rationalize the ruling in connection with the Boiler House and Garage.

The controversy about the use of cinder block in these basement rooms was one of several controversies that were in existence at the time between the Government and Plain-

tiffs. As *part of an overall settlement of these several controveries,* Plaintiffs agreed to make certain changes in these rooms. Testimony in this regard (R. p. 186) is as follows:

> "By Mr. Steer:
> Q. Do you know that at the time, whenever it was—I'm not relating to time, but when you discovered the cinder block in the main building and either instructed the resident engineer or took steps to have the proper finish, as proper in your opinion, installed, that there were other arguments and controversies in the job concerning what should and should not be done on the job?
> A. There were many controversies.
> Q. And don't you know that the contractor's decision to accept your decision on the cinder block and to apply the matt glazed tile as it was applied was a part of an overall settlement of this and other controversies? And if you don't know, say you don't know. I'm not——
> A. Yes."

Subsequently Mr. Brown attempted to change his testimony in this regard, but this attempt proved abortive (R. pp. 187 and 188).

(V) Even Though It Were Held That the Court Could Look Beyond the Words of Finish 51, "Structural Unglazed Units," Sections 4 and 5 Do Not Require Petitioners to Furnish Facing Tile; the Specifications Call for "Smooth Structural Unglazed Units" for Areas Taking Finish No. 51: They Do Not Call for "Smooth Unglazed Structural Facing Units."

The words "structural unglazed units" are definitive, and they have a definite meaning in the trade as shown above. It is important to note that they refer to *any* building unit, whether of tile, brick, concrete block, or stone, the specifications for whose properties relate to strength and durability, without regard to appearance (R. pp. 19-

20). All of the Government's Exhibits 1, 2, 3, 4 and 9 are "structural unglazed units" (Tucker, R. p. 208, Allen, pp. 216, 217).

Structural tile are defined and described in Federal Specifications SS-T-341a and SS-T-351a (Pltffs.' Exs. 3 and 4 respectively), both of which specifications are mentioned in Sections 4 and 5 of the job specifications. They are likewise "structural units." They are *normally "unglazed,"* unless otherwise specified, and the word "unglazed" (meaning merely absence of glaze) is usually omitted (R. pp. 20-21). The term "unglazed" is not used in the above-mentioned Federal Specifications because the manufacturing process they describe can result only in an "unglazed" unit. Article D-1 of both specifications refers to "The die skin of the tile," obviously the natural unglazed finish of the material. Article I-3 of Specification SS-T-351a and Article I-4 of Specification SS-T-341a refer to the variation of the color of the tile with the degree of burning, again clearly referring to the natural unglazed finish.

Hence, structural tile is defined by these *Federal Specifications* is "structural unglazed tile" only. It is not facing tile (Lichter R. pp. 20-21; Bingham R. p. 63).

Structural unglazed *facing* tile is described in Paragraph 5-05 (b)(2). This paragraph is a sub-paragraph *under* Paragraph 5-05, entitled "Structural Facing Units," and describes one of the "types and qualities" of facing tile listed. That it refers to structural facing tile *only* is further shown by the reference to "Type FTX," which is the designation (R. pp. 23, 59) of one of the types of facing tile described in ASTM Specification G212-52 entitled "Tentative Specifications for Structural Clay Facing Tile" (R. pp. 16, 18; Pltffs.' Ex. 5). It should be clear then that Paragraph 5-05 (b)(2) refers only to unglazed *facing* tile.

The significance of the use of the word "facing" has already been mentioned. The witnesses all agree that when

the term "facing" is used, a different and more expensive type of tile is referred to then when the term is omitted. The term "facing" is not used in connection with Finish No. 51 of the Finish Schedule, nor is it used in the last sentence of Paragraph 5-04. Plaintiffs submit that this language must be read as it stands in the absence of this essential and significant term.

The non-use of the term "facing" in the Finish Schedule and in Paragraph 5-04 is clearly not inadvertent. Paragraph 5-04 refers to the Finish Schedule; it must therefore have been written *after* the Finish Schedule was prepared. Because of the significance in the trade of the term "facing," the specification writer, if he had so intended, could have here inserted the term and thereby eliminated any question (if any question existed) as to the meaning intended. Failing this, he could have inserted the word "facing" in Paragraph 5-04 at the time Addendum No. 1 was issued, as was done in the amendments to Paragraph 5-02 by Item 16 of this Addendum. Hence, it must be clear that the specification writer *did not intend* that facing tile be used where Finish 51 was specified.

It is noteworthy, too, that it would have been a simple matter, if that were the intent, to so show by the addition of a few words, other than the word "facing," to the language of Paragraph 5-04. The significant sentence could have been made to read "structural unglazed units marked in Finish Schedule shall be smooth, unglazed units *as called for in Paragraph 5-05(b)(2).*" Or it could have been made to read "structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units, Type FTX." Either of these changes, or the use of the term "facing" would have conveyed the idea that the more expensive tile was desired. In the absence of such language, Petitioners submit that it is obvious that facing tile, the more expensive type of tile, *was not desired.*

The last sentence of Paragraph 5-04, in addition to the fact that the term "facing" is not used, shows in still another way, by its own language, the intent that structural clay tile as called for in Federal Specifications SS-T-341a and SS-T-351a is desired, and that facing tile is not being called for. This sentence changes the language in the Finish Schedule merely by the addition of the word "smooth," thereby indicating an *election* of the smooth finish from several finishes available. Such an election *is not possible* with facing tile, as Type FTX tile is *always smooth* (R. p. 23; also Pltffs.' Ex. 5, Article 2); it comes in *only one* type of finish. Such an election is possible *only* with structural clay tile as described in Federal Specifications SS-T-341a and SS-T-351a, because the tile in these specifications come in *several* finishes, one of which is smooth (R. pp. 21 and 58; Article B-2 of both Petitioners' Exs. 3 and 4). Hence, it should be clear from the language of Paragraph 5-04 alone that only structural tile is called for, and that facing tile is not called for.

The Court indicates that Petitioners concede that in . . . Section 5-04, structural unglazed units are "identified" as smooth unglazed units. This is not true. Plaintiffs concede only what Section 5-04 states, namely, that the structural unglazed units called for in the Finish Schedule (which might be any of several finishes as pointed out above) are to be smooth unglazed units.

The Court indicates that Petitioners say that the expression "smooth unglazed units" is not sufficiently definite to indicate facing tile. This is not true. On the contrary, Petitioners contend that the term "smooth unglazed units" definitely has no reference to and excludes "facing tile" by reason of the fact, as shown above, that the term "facing," the essential and distinguishing term, is not used in the term "smooth unglazed units." And, as shown above (supra, pages 21 and 22), the term "smooth unglazed units"

in Paragraph 5-05(b)(2) has no relevance as that paragraph refers clearly to smooth unglazed *facing* units only.

The Court says (p. 20) that the term "structural facing units" would not be sufficiently definite because such units might be either glazed or unglazed. This is untrue, and demonstrates the Court's complete failure to understand the problem. The testimony shows that there are several kinds or types of units (or tile); that there are structural units and that there are structural facing units; that there are structural unglazed units and structural glazed units; and that there are structural unglazed facing units and structural glazed facing units; and that the correct term must be used for each in order to differentiate between them (R. pp. 23, 24, 213, 216). It is true that the word "unglazed" is sometimes omitted as superfluous in speaking of "structural unglazed facing units," as the word "unglazed" means merely "without glaze"; this is the manner in which the material is manufactured unless put through the additional operation of glazing. There is nothing, however, in the Record to indicate that the word "facing" may be omitted either when unglazed facing units are desired or when glazed facing units are desired. On the contrary, the testimony of all witnesses, both plaintiffs' and defendants', shows that the word "facing" is the essential and definitive word to distinguish the cheaper type of unit from the more expensive.

The Court says, too, that the word "unglazed" indicates in the trade that a product is called for which might in some instances be either glazed or unglazed. This again is untrue, and again demonstrates the failure of the Court to understand the problem. The testimony clearly shows that to obtain a glazed unit, the term "glazed" must be used; and that, if the term "glazed" is not used, or if the term "unglazed" is used, unglazed tile is referred to. The Commissioner's finding is contrary and does violence to the

meaning of the words "glazed" and "unglazed," both in the common usage and in the language of the trade.

Again (p. 20) the Court places some reliance upon its feeling of the straw man that it puts up, that the expression "structural facing units" would not be sufficiently definite. Petitioners concede that, but what of it? The fact that one phrase is not definite enough does not per se make another phrase indefinite. The correct term must be used if a specific material is to be required. Obviously, the writer of these specifications intended that any of the several units meeting the definition of structural unglazed units would be satisfactory for the finish of the boiler house and garage.

CONCLUSION

In conclusion it is urged that a Writ of Certiorari issue. The question of law here involved is of importance, not only because Petitioners have at stake a sum of money not inconsiderable in amount, but the Court should always use its supervisory power to assure litigants that the courts will correct errors of law committed below. Truly, great vigilance should be exercised in this function of the Court, because it is within this function that courts below may oftener than most fail to do justice to litigants. Here, we submit, the Court went out of its way to give a distorted interpretation to the plain words of the contract with an accepted meaning in the trade. This Court should not permit this to stand.

Respectfully submitted,

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